No. 18409

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRANK URSICH,

Appellant,

vs.

MANUEL G. DA ROSA, ANTONIO GARCIA DA ROSA, MARIA A. ROSA, VICTORINO GARCIA DA ROSA and MARY ROSA SANTOS,

Appellees.

PETITION FOR REHEARING.

MARGOLIS & MCTERNAN,
3175 West Sixth Street,
Los Angeles, Calif. 90005,
Attorneys for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Case

Textbook

No. 18409

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRANK URSICH,

Appellant,

vs.

MANUEL G. DA ROSA, ANTONIO GARCIA DA ROSA, MARIA A. ROSA, VICTORINO GARCIA DA ROSA and MARY ROSA SANTOS,

Appellees.

PETITION FOR REHEARING.

The opinion of the Court in this case affirms the judgment below upon the basis of a number of important rulings on issues which were not argued by the parties either in their briefs or on oral argument. There are serious problems related to these significant holdings which should be evaluated in an adversary fashion; our judicial process operates on the premise that in this manner correct results will be obtained most frequently.

I.

The Court Should Reconsider With the Assistance of Briefs and Argument Its Holding That Where Res Ipsa Loquitur Is Applicable but Is Not Covered in the Instructions, It Is Not Error to Give a "Mere Happening of the Accident" Instruction.

In the presentation of the parties the question whether the instruction that no inference of negligence could be drawn from the mere happening of the accident was erroneously given was limited to the related question whether *res ipsa loquitur* (hereafter called *res ipsa*)

applied; the only contention of appellees and the only matter argued was that *res ipsa* was inapplicable and that therefore the instruction on the "mere happening of an accident" was proper. The Court's holding that even if *res ipsa* is applicable the refusal was proper, was never an issue as between the parties.

The following questions should be treated on rehearing:

1. The only authorities which have been cited on the point are those presented by appellant in support of his position. There should be a more complete examination of all the authorities in order to determine what law there is, if any, supporting the holding of this Court and in order to allow a more complete consideration of this Court's conclusion.

2. The point made by this Court in support of its holding that the instruction helped both appellant and appellees because it cut both ways[1] should be reconsidered in order to determine whether an instruction, objected to by a party, and which is unfavorable to one issue in his case, may properly be given because the instruction is favorable to that party with respect to another issue.[2]

3. The statement of this Court, in support of its holding that proper general instructions on negligence, unrelated to *res ipsa* were given, should be re-assessed to consider whether this constitutes a justification for the giving of a "mere happening of the accident" instruction in a case where the *res ipsa* principle that an inference of negligence may be drawn from the "mere happening of the accident" applies.

---

[1]This would be so only if there was any substantial evidence of appellant's negligence, an issue which the Court did not reach.

[2]The consideration should include the factor that it was unfavorable on a decisive issue and favorable on one where appellant's recovery might have been diminished, if at all.

4. The statement of the Court, in support of its holding that in a *res ipsa* case a "mere happening of the accident" instruction is proper as the first sentence of a *res ipsa* instruction, should be reconsidered in the light of the fact that the combined dual instruction precisely informs the jury that it may draw an inference of negligence "from the mere happening of the accident"; where given alone the "mere happening of the accident" instruction states the exact opposite. If the combined instruction would be correct, can an instruction which has the opposite effect also be correct?[3]

5. The reference of the Court, in support of its holding, to the fact that the "mere happening of the accident" instruction embodied the proposition that it applied "as a rule" should be further evaluated in the light of the fact that nothing in the instructions indicates that any other instruction is applicable in this case. Consideration should be given to the proposition that the giving of an instruction which is inapplicable, with the indication that it may be applicable, is error.

II.

The Court Should Reconsider, With the Assistance of Briefs and Argument, Its Holding That in a Maritime Case the Res Ipsa Rule Permits but Does Not Compel an Inference of Negligence.

At no stage of this case prior to the opinion of this Court was any question raised as to the correctness of the form of the proposed *res ipsa* instruction. The only issue raised at trial, passed upon by the trial court and argued on appeal, was whether any *res ipsa* principle was applicable at all to the evidence presented in this case. The

---

[3]Consideration should be given to the question of whether *Sweeney v. Erving* (1913), 228 U.S. 233, cited in the Court's opinion on the limited effect of *res ipsa* does not itself declare that "the mere happening of an accident" instruction standing alone is inconsistent with *res ipsa*. 228 U.S. at 238.

Court's holding that *res ipsa* in a Jones Act permits but does not require an inference is of major importance and requires reconsideration with an adversary presentation. The following issues should be treated on rehearing:

1. The cases cited by the Court on this point did not involve the issue here presented and the language dealing with it is dicta; the extent to which such dicta is binding on this Court should be considered.

2. It is important to delineate carefully the difference between the shifting of the burden of proof (which is what it is directly held may not be done in some of the cases cited in the Court's opinion) and shifting the burden of going forward which is what the rejected instruction here stated to be the law. A careful examination of the authorities is necessary to determine whether dicta as part of discussions which slur over this difference should be followed.

3. Consideration should be given to the facts: that the dicta in these cases can be traced back to an old federal malpractice case, *Sweeney v. Erving,* 228 U.S. 233, which in turn relied upon early state cases from New York, New Hampshire and North Carolina, thus indicating that the Supreme Court looked to state law to determine the issue here presented; that the modern trend in the states is exemplified by the instruction requested here; and that the Supreme Court has repeatedly declared that the Jones Act "is to be liberally construed to accomplish its beneficent purposes." Norris, *The Law of Seamen,* Vol. 2, Par. 658, page 793. A comprehensive survey of the opinions in this area is required to permit this Court to declare the law on this subject.

4. The Court held that the *res ipsa* instruction was properly rejected because it did not correctly state the *res ipsa* principle. It should be considered whether this

clearly correct general principle is applicable to a case in which the only objection and the only basis for the trial court's refusal to give it was a different ground, thus unintentionally misleading appellant and leading to his not offering an alternate instruction.

III.

The Applicability of Res Ipsa Loquitur to the Facts of This Case Should Be Determined on Rehearing.

There are two important questions here:

1. Where at the conclusion of appellant's case, *res ipsa* applies, the appellant having offered no explanation as to the cause of the accident,[4] is the *res ipsa* principle eliminated from the case by virtue of an explanation by the appellees of the cause of the accident, which explanation does not entitle appellees to a directed verdict?

2. Is the answer to the above question affected by the fact that the explanation itself shows that the manner in which the work leading to the accident was done was such that the accident reasonably could have been anticipated to result therefrom, particularly where accompanied by the admission that the work could have been done in such a manner as to avoid this hazard?

Respectfully submitted,

MARGOLIS & MCTERNAN,
By BEN MARGOLIS,
Attorneys for Appellant.

---

[4]The question as to whether the appellant's offering of such evidence would render *res ipsa* inapplicable need not be reached here.

Certificate.

Ben Margolis, attorney of record for appellant herein, herewith certifies that this Petition for Rehearing is in his judgment well founded and is not interposed for delay.

Ben Margolis